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Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

HOWARD E. SAARI,
Petitioner,

vs.

SMITH BARNEY, HARRIS UPHAM & CO., INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTORY STATEMENT

This brief in opposition to petition for writ of certiorari is filed on behalf of SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED ("Smith Barney"), defendant in the district court and appellant in the Ninth Circuit proceedings. It is filed in opposition to the petition filed by HOWARD E. SAARI ("Saari"), plaintiff in the district court and appellee in the Ninth Circuit proceedings.

Saari's petition seeks review of the arbitrability of a federal statute, an issue most recently resolved against Saari in this Court's decision entitled *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. ____, 114 L.Ed. 2d 26, 111 S. Ct. 1647 (1991).

While Saari seeks to distinguish this Court's decision in *Gilmer* because a separate piece of federal legislation is involved, the Employer Polygraph Protection Act ("EPPA") rather than the Age Discrimination and Employment Act ("ADEA"), the Ninth Circuit Court of Appeals properly found the polygraph statute to be equally arbitrable based upon this Court's directives in *Gilmer*.

There is neither need nor basis for this Court's review of the Ninth Circuit's decision below. There is neither conflict between the circuits nor an unsettled area of the law to resolve. The continuous line of decisions from this Court extolling the virtues of arbitration as applied to various and diverse federal legislation contradicts Saari's assertion that the issue is entitled to review.

Even if considered on its merits, Saari's petition would be denied. His central premise confuses the issue of voluntary submission to a polygraph test with voluntary submission to an agreement to arbitrate. Whatever substantive rights Saari may possess with regard to the purportedly coercive use of polygraph examinations, those rights can be fully discharged in arbitration.

II.

STATEMENT OF THE CASE

Saari's statement of the case, as appears at pages two through four of his petition, is essentially correct. Pursuant to an arbitration clause contained within a Uniform Application for Securities Industry Registration ("U-4 Form"), together with Rule 347 of the Rules of the New York Stock Exchange, Smith Barney moved to compel arbitration of Saari's various federal and state claims.[1]

The original motion, filed prior to *Gilmer*, was denied by the trial court. Prior to appellate briefing, this Court rendered its decision in *Gilmer*, causing the Ninth Circuit to reverse the trial court's order and compel arbitration of all of Saari's claims.

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[1]Both the U-4 Form and Rule 347 were before this Court in *Gilmer*.

While Smith Barney denies that there is any basis for granting this petition, it does not contest Saari's assertion of jurisdiction at any step of the proceedings.

III.

ARGUMENT

A. THE PETITION SHOULD BE DENIED AS SAARI HAS FAILED TO DEMONSTRATE ANY BASIS FOR REVIEW IN THIS COURT.

This Court has consistently rendered a continuing line of decisions confirming the arbitrability of specific federal legislation: *Gilmer* [ADEA]; *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 96 L.Ed. 2d 185, 107 S. Ct. 2332 (1987) [Securities Exchange Act of 1934]; *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477, 104 L.Ed. 2d 526, 109 S. Ct. 1917 (1989) [Securities Act of 1933]. Additionally, other recent decisions of this Court confirm the virtues of arbitration as a dispute resolution process. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 74 L.Ed. 2d 765, 103 S. Ct. 927 (1983); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614, 87 L.Ed. 2d 444, 105 S. Ct. 3346 (1985).

Following *Gilmer,* which resolved a conflict between the Fourth and Third Circuits concerning the arbitrability of claims under the ADEA, various circuit and district courts have uniformly applied the teaching of *Gilmer:* Claims under various forms of federal legislation are properly subject to arbitration. These include the following: *Alford v. Dean Witter Reynolds Inc.,* 939 F.2d 229 (5th Cir. 1991) [Title VII]; *Willis v. Dean Witter Reynolds, Inc.,* 948 F.2d 305 (6th Cir. 1991) [Title VII and state sexual discrimination statute]; *Bierdeman v. Shearson Lehman Hutton Inc.,* 1992 U.S. App. Lexis 13271, Lexis p. 2 (9th Cir. May 28, 1992) [Title VII]; *Mago v. Shearson Lehman Hutton Inc.,* 956 F.2d 932 (9th Cir. 1992) [Title VII]; *Bender v. A. G. Edwards & Sons Inc.,* 971 F.2d 698 (11th Cir. 1992) [Title VII]; *Sacks v. Richardson Greenshields Securities Inc.,* 781 F. Supp.

1475 (E.D. Cal. 1991) [gender discrimination under California's Fair Employment and Housing Act]; *Kaliden v. Shearson Lehman Hutton Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991) [ADEA and State Human Relations Act]; *Boogher v. Stifel, Nicholaus & Co.*, 764 F. Supp. 574 (E.D. Mo. 1991) [ADEA]; *Bender v. Smith Barney, Harris Upham & Co. Inc.*, 789 F. Supp. 155 (D.E.N.J. 1992) [Title VII]; *Gardner v. Benefits Communications Corp.*, 1991 U.S. Dist. Lexis 18367, Lexis p. 2 (D.D.C. Dec. 31, 1991) [D.C. Human Rights Act]; *King v. The First Boston Corp.*, 1992 U.S. Dist. Lexis 4745, Lexis pg. 2 (S.D.N.Y. Apr. 13, 1992) [Title VII]; *Scott v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1992 U.S. Dist. Lexis 13749, Lexis pp. 11-12 (S.D.N.Y. Sept. 14, 1992) [Title VII]; *Foley v. Presbyterian Ministers Fund*, 1992 U.S. Dist. Lexis 3572, Lexis pp. 5-6 (E.D. Pa. Mar. 20, 1992) [ADEA]; and *Friedman v. Hamilton Investments Inc.*, 1992 U.S. Dist. Lexis 8258, Lexis p. 6 (N.D. Ill., Eastern Div., Jun. 9, 1992) [ADEA].

The appellate history in *Alford v. Dean Witter Reynolds Inc., supra*, is perhaps most instructive in demonstrating why Saari's petition should be denied. In the original Fifth Circuit opinion, 905 F.2d 104 (5th Cir. 1990), the Court of Appeals refused to compel arbitration. This Court then granted certiorari, vacating the Fifth Circuit's opinion and remanding the matter to the Fifth Circuit in light of this Court's decision in *Gilmer*. In a subsequent opinion, 939 F.2d 229 (5th Cir. 1991), the Fifth Circuit reversed its earlier decision and compelled arbitration of all claims.

The more recent Sixth Circuit decision in *Willis v. Dean Witter Reynolds, Inc., supra*, further illustrates the absence of any present need for Supreme Court involvement. When faced with a claim under Title VII and the Kentucky state sexual discrimination statute, the Court of Appeals compelled arbitration of Willis' claims, specifically noting the following:

> ... We find *Gilmer* to be dispositive of every argument presented by the plaintiff and the EEOC in this appeal.

(948 F.2d at 307.)

In *Alford*, the plaintiff attempted to distinguish the *Gilmer* decision by asserting that the claim involved Title VII rather than

the ADEA. In granting certiorari to vacate the appellate court's original decision refusing to compel arbitration and mandating for further proceedings in light of *Gilmer,* this Court specifically found Alford's distinction to be meaningless. The message from *Gilmer* is clear and not nearly so limited as Saari's petition would suggest. Claims arising under various federal statutes, including the ADEA, Title VII, the EPPA and others, are properly compelled to arbitration pursuant to a validly executed U-4 Form.

Accordingly, Saari has demonstrated no basis for obtaining review in this Court. The Ninth Circuit's opinion properly corresponds with this Court's directives in *Gilmer* and is accord with all circuit courts which have rendered decisions following *Gilmer.*

B. THE PETITION SHOULD BE DENIED AS SAARI HAS FAILED TO DEMONSTRATE A BASIS FOR DISTINGUISHING CLAIMS UNDER THE EPPA.

Saari attempts to argue that differences in wording between the EPPA and the ADEA require that the *Gilmer* decision be discarded in considering the arbitrability of Saari's claim.[2] Essentially, Saari argues that because the EPPA anti-waiver provision provides that the "rights and procedures" provided by this chapter may not be waived by contract or otherwise, 29 U.S.C. § 2005(d), arbitration cannot be compelled.

The Ninth Circuit expressly rejected Saari's argument, advising that Saari's argument could not stand in light of *Gilmer.* (Appendix A, at 9.) The Ninth Circuit stressed that in *Gilmer* this Court

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[2]In briefing this issue at the district court level prior to the *Gilmer* decision, Saari made no such attempts to differentiate between the ADEA and the EPPA. To the contrary, because of then existing precedent such as *Nicholson v. CPC International Inc.,* 877 F.2d 221 (3rd Cir. 1981), Saari argued that similar results should obtain under both Acts, specifically advising the trial court that "a comparison of the ADEA and the EPPA reveals that the enforcement schemes are virtually the same and, thus, the same reasons that compelled the *Nicholson* court to conclude that arbitration is incompatible with the ADEA also compelled the conclusion that arbitration is incompatible with the EPPA." (CR 10, P. 9, LL. 12-18.)

noted that the substantive rights enforced by arbitration are identical to those enforced in a judicial forum, the only difference being an agreement by the parties to submit the "resolution in an arbitrable, rather than a judicial, forum. *Gilmer*, 111 S. Ct. at 1652." (Appendix A, at 9.)

The Ninth Circuit then went on to note that the term "procedures" is simply too broad to relate solely to forum selection. For an employer to utilize the provisions relating to ongoing investigations under Section 2006(d), it would be required to follow certain "procedures." The type of protective procedures found in Section 2006(d) (where polygraphs *may* be required under the Act) are the "rights and procedures" properly subject to the anti-waiver clause. (Appendix A, at 9-10.)

Finally, the Ninth Circuit emphasized that the "and procedures" language in the EPPA is no stronger than the anti-waiver provisions found in the Sherman Act, the Securities Exchange Act of 1934, the Securities Act of 1933 and RICO. Despite language in each of those Acts precluding waiver, this Court has specifically held that arbitration should be compelled in each context. (Appendix A, at 10.)

C. THE PETITION SHOULD BE DENIED AS SAARI'S CENTRAL PREMISE FAILS TO DIFFERENTIATE BETWEEN VOLUNTARY SUBMISSION TO A POLYGRAPH EXAMINATION AND VOLUNTARY EXECUTION OF AN ARBITRATION PROVISION.

Even if Saari could demonstrate a basis for Supreme Court review, his theory of relief is unsupportable. A fatal flaw in his petition is his failure to distinguish between the substantive rights under the EPPA (a prohibition against coerced or involuntary polygraph testing) and the resolution of which forum should properly resolve and discharge those rights. Specifically, Saari's petition asserts at page 9:

> If the intent of Congress was, as it clearly was, to prohibit the compelling of polygraph examinations as a condition of obtaining or keeping a job, then permitting an employer as a condition of employment to compel a potential employee to

> forego the judicial remedy and arbitrate a claim for violation of the Act is inherently inconsistent.

Saari's argument is both illogical and unsound. While Congress indeed intended to prohibit the compelling of polygraph examinations as a condition of obtaining or maintaining employment, that right can and is being properly protected and enforced in both the judicial and the arbitration forum. Saari's rights to seek relief under the Act are unaffected by whether or not he has executed an agreement with his employer which contains an arbitration clause.

D. THE PETITION IS NOT SAVED BY SAARI'S INCLUSION OF VARIOUS STATE LAW THEORIES.

Finally, Saari argues that his California *Labor Code* claims cannot be compelled to arbitration because there is a limitation on federal preemption in the EPPA. (Petition, P. 10.) The Ninth Circuit quickly disposed of Saari's argument, noting that there is no exemption of federal polygraph claims. (Appendix at 12.) More specifically, with regard to the issue of preemption in general, the Ninth Circuit's opinion concluded as follows:

> Section 2009 merely protects state statutory remedies which are more protective of the employee than EPPA. It does not, however, determine whether the state law claim should be arbitrated or adjudicated in the federal district court. To the extent that California's preference for a judicial forum would interfere with the choice expressed by Congress and the FAA, it is preempted. *See Perry v. Thomas*, 482 U.S. 483, 491 (1987) (state statute providing a judicial forum for a wage/commission claim based on the sales of securities which is in conflict with the FAA must give way).

IV.

CONCLUSION

For the reasons stated, the petition should be denied in its entirety.

Dated: October 20, 1992

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